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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENIE INDUSTRIES, INC., a Washington corporation,

Plaintiff - Appellee,

v.

FEDERAL INSURANCE COMPANY, an Indiana corporation,

Defendant,

and

LIBERTY MUTUAL INSURANCE CO., a Massachusetts corporation,

Defendant - Appellant,

and

ROYAL SURPLUS LINES INSURANCE COMPANY, a Connecticut corporation; ROYAL INDEMNITY COMPANY, a Delaware corporation (as successor in interest to Royal Insurance Company of America,

No. 07-35006

D.C. No. CV-05-01616-MJP

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted May 9, 2008
Seattle, Washington

Before: ALARCÓN, GRABER, and RAWLINSON, Circuit Judges.

Under Washington law, insurance contracts "are interpreted according to the intent of the parties, which is discerned from the language of the contract and the circumstances in which it is formed." *Safeco Ins. Co. v. Auto. Club Ins. Co.*, 31 P.3d 52, 57 (Wash. Ct. App. 2001) (footnote reference omitted). Further, "parties may . . . contract for automobile insurance coverage that only becomes available after all other insurance available, including excess insurance, is exhausted." *New Hampshire Indem. Co. v. Budget Rent-A-Car Sys., Inc.* (*Budget*), 64 P.3d 1239, 1242 (Wash. 2003) (En Banc), *as amended*.

Royal Surplus Lines Insurance Company's (Royal) policies contained super escape clauses, while Liberty Mutual Insurance Company's (Liberty) policy contained an excess clause. Under *Budget*, Royal's policy is to be construed to "exclude coverage if excess insurance is available." *Id.* Therefore, the district

court did not err in ordering Liberty to reimburse Royal under the express terms of the contracts.

An insured is entitled to recover attorney's fees from an insurer when the fees were incurred "because an insurer refuse[d] to defend or pay the justified action or claim of the insured . . ." *Olympic Steamship Co. v. Centennial Ins. Co.*, 811 P.2d 673, 681 (Wash. 1991) (En Banc), *as changed*. The district court awarded Genie Industries (Genie) attorney's fees under this doctrine.

Liberty first attempted to assert, on a motion for reconsideration, that Genie failed to properly notify Liberty of potential losses under its policy. However, the facts surrounding Liberty's defense were known throughout the litigation. As such, its attempt to raise the issue for the first time in a motion for reconsideration was properly denied because the facts at issue were not newly discovered. *See Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

Even if Liberty had not attempted to raise this issue for the first time in a motion for reconsideration, it would still not prevail. "Whether an insured breached its obligations under the insurance contract and whether the insurer was prejudiced thereby are factual determinations to be resolved by the trier of fact." *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 922 P.2d 126, 131 (Wash. Ct. App. 1996) (citations omitted). Given Genie's factual assertion that it provided

notice as soon as practicable, Liberty cannot demonstrate that Genie "undisputedly failed to comply with express coverage terms." *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 881 P.2d 1020, 1034-35 (Wash. 1994) (En Banc).

AFFIRMED.